(22,427.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 454.

JEAN L. SHELTON, AND ANNA GERTRUDE SHELTON AND ROBERT PHILO SHELTON, BY THEIR GUARDIAN, MARY L. FAIRCHILD, APPELLANTS,

vs.

FRANK B. KING, WM. H. SAUNDERS, AND GEORGE W. WHITE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1911.

1 In the Court of Appeals of the District of Columbia.

No. 2085.

FRANK B. KING et al., Appellants,
vs.
JEAN L. SHELTON et al.

Supreme Court of the District of Columbia.

Equity. No. 28420.

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT Philo Shelton, by Their Guardian, Mary L. Fairchild, Complainants,
vs.
FRANK B. KING, WM. H. SAUNDERS, and GEORGE W. WHITE, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, towit:

Bill to Declare Trust.

Filed March 26, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28420.

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT Philo Shelton, by Their Guardian, Mary L. Fairchild, Complainants,
vs.
FRANK B. KING, WM. H. SAUNDERS, and GEORGE W. WHITE, Defendants.

In the Supreme Court of the District of Columbia, Holding a Special Term for Equity Court Business.

The complainants respectfully state:

1st. That they and all the defendants are citizens of the
2 United States; that complainants are residents of the City of Bridgeport, State of Connecticut; that the defendants are residents of the City of Washington, District of Columbia.

2nd. That the infant complainant, Anna Gertrude Shelton, is of the age of nineteen years, and Robert Philo Shelton is of the age of thirteen years, the former having been born on the 8th day of January, 1890, and the latter on the 12th day of January, 1896.

3rd. That Mary L. Fairchild was duly appointed guardian of the estate of the said two infant complainants by the Probate Court on the eleventh day of November, 1902, at the District of Bridgeport, State of Connecticut, and thereafter, to wit, on the 23rd day of March, 1909, ancillary letters of guardianship were issued to said Mary L. Fairchild by the Probate Court of the District of Columbia, and she now joins in this suit on behalf, and in the interest, of the said infant complainants.

4th. That heretofore, to wit, on the 16th day of November, 1907, the late Anna Smith Mallett, deceased, leaving a last will and testament, bearing date June 26, 1903, and two codicils thereto, the first of which was dated June 23, 1904, and the second of which was dated June 26, 1906; that the said will and codicils thereto were duly admitted to probate and record as a will of both real and personal property in the Probate Court of the District of Columbia, during the month of February, 1908. Complainants file herewith a copy of the said last will and testament, and the codicils above referred to which they mark complainants' Exhibit No. 1, and pray that the same may be considered as a part of this petition.

5th. That according to the third paragraph of the said will, there is a bequest in the following language:

"I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin, John Consider Shelton, deceased, all of Bridgeport, Connecticut, the sum of seventy-five thousand dollars, being twenty-five thousand dollars to each."

That in the codicil of the 23rd of June, 1904, the following appears:

"In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, N. W., and George W. White, paying teller of the National Metropolitan Bank, co-trustees with the said F. B. King, to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton, said trustee-ship to terminate when these legatees shall receive their portions of my estate.

It is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

And complainants further state that there is now in the possession of Mr. Frank B. King, defendant herein, and executor under the last will and testament of Anna Smith Mallett, deceased, either
3 in the shape of securities or moneys, the legacies provided for in the third paragraph of the said last will and testament, and your complainants are informed that it is the purpose of the said Frank B. King to turn over said legacies to himself and the other two defendants to this bill, to be by them held under the terms of

said will, unless some different order or direction is made by this court in the premises.

6th. Your complainants are advised and so charge that said alleged trust under the first codicil of said will, is void as being in restraint of alienation, for which reason it is the duty of said Frank B. King, as executor, to disregard the same and pay over to your complainants the legacies mentioned in the third paragraph of the said will, but even if said trust is not void, which contention these complainants insist upon, yet the same must be terminated upon the request of complainants, which request they now make; and complainants further state that it would serve no useful purpose to turn said fund over to said trustees, and then have the same paid over to complainants, or their duly qualified guardian, but, on the contrary, would result in increased and unnecessary charges to the detriment and loss of complainants. Your infant complainants further state that their guardian does not propose to charge them any commissions or fees for the administration of such funds as may come into her possession, and therefore it will be greatly to their interests that the legacies mentioned in the third paragraph of said will be paid over by the executor to the parties in interest, rather than through the trustees.

The premises considered, complainants pray:

1. That the writ of subpœna be directed to issue to each of the defendants to this bill, requiring them and each of them to appear and answer the exigencies hereof.

2nd. That a decree may be passed in this cause, declaring the trust under the codicil of the 23rd of June, 1904, void, as being in restraint of alienation, and that the proceeds of the legacies, mentioned in the third paragraph of said last will and testament, be paid over to complainants or their legally qualified guardian by the said Frank B. King, executor.

2½. That if the court shall be of opinion that the trust established in the first codicil of the will, with reference to the legacies mentioned in the third paragraph of the will, are not void as in restraint of alienation, but that under said first codicil a trust is established, then these complainants pray that the said trust may be immediately terminated, to the end that the executor may turn over to your complainants, or their legally appointed guardian, the legacies mentioned in the third paragraph of said last will and testament.

3rd. That pending the hearing on this bill of complaint, said Frank B. King, as executor of the estate of the late Anna Smith Mallett, be restrained and enjoined from paying over said legacies mentioned in the third paragraph of the said paper to himself and the other defendants, to be held in trust.

4 4th. And for such other and further relief as to the court shall seem proper and necessary in the premises.

JEAN L. SHELTON.
MARY L. FAIRCHILD,
Guardian.

BIRNEY & WOODARD,
Sols. for Complainants.

I, Jean L. Shelton, on oath, say that I have read the petition in equity by me above subscribed, and that I know the contents thereof; that the facts therein stated of my own knowledge I know to be true, and those upon information and belief, I believe to be true.

JEAN L. SHELTON.

STATE OF CONNECTICUT,
County of Fairfield, ss:

Subscribed and sworn to before me this 25th day of March, 1909.

[SEAL.] CHARLES S. CANFIELD,
Notary Public.

COMPLAINANTS' EXHIBIT "A."

Filed March 30, 1909.

In the Name of God, Amen.

I, Anna Smith Mallett, of the City of Washington, in the District of Columbia, being of sound and disposing mind and memory, do make and publish this instrument of writing, as and for my last will and testament.

1. I direct my executor hereinafter named, to cause proper gravemarks to be placed at my grave,—and to have my name and the dates of my birth and death, suitably, inscribed upon the monument erected in the family plot in Mountain Grove Cemetery, Bridgeport, Connecticut.

2. I give bequeath and devise to the Mountain Grove Cemetery Association, Bridgeport, Connecticut, the sum of five hundred dollars, in trust, to keep the same safely invested, and from the interest and income thereof, to maintain in perfect order, perpetually, the family plot in said cemetery, purchased by, and deeded to my father, the late Charles Mallett.

3. I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin John Consider Shelton, deceased, all of Bridgeport, Connecticut: the sum of Seventy-five Thousand dollars, being Twenty-five Thousand to each.

Also I give, bequeath and devise to the said Jean L. Shelton, my opal and diamond ring, my insignia of the Daughters of the American Revolution, and my garnet bracelet.

Also, to the said Anna G. Shelton, I give, bequeath and devise my two-stone diamond ring, and my gold beads, which once belonged to my grandmother, Hannah Haines Mallett.

5 4. I give, bequeath and devise to my friend, Sarah Gertrude Taylor, of East Orange, New Jersey, and to my cousin, Alice Catherine Cox, of Washington, District of Columbia, the sum of Ten Thousand dollars, being Five Thousand to each.

5. I give, bequeath and devise to Josephine Kissam, daughter of Edward V. B. Kissam, of New York city, the sum of Two Thousand dollars, and my diamond cross, which was formerly the property of her grandmother, Joanna W. Peck.

6. I give, bequeath and devise to Sarah Josephine Bayles, and to Madge Isabel Bayles, daughters of W. Harrison Bayles, of New York City, the sum of two thousand dollars, being one thousand to each.

7. I give, bequeath and devise to Carroll Hobart Dawson of Washington, D. C., to Anna Sherman Benedict (Mrs. John) of Bridgeport, Connecticut, to Charles Mallett Beardsley of Hartland, Niagara County, New York, the sum of Fifteen Hundred dollars, being five hundred to each.

8. I give, bequeath and devise to Lucy, daughter of the late Elizur W. Keeler of Waterbury, Connecticut, the sum of Five Hundred dollars.

9. I give, bequeath and devise to the Pro Cathedral Church of the Ascension, the sum of Three Thousand Dollars, the same to be devoted towards the purchase or the erection of a Parish-House for the use of said parish.

10. I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal wheresoever and whatsoever, of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude, and R. Philo Shelton.

11. Lastly, I do constitute, name and appoint Frank B. King, of 1442 Rhode Island Avenue, Washington, District of Columbia, Executor of this, my last will and testament—and do authorize and empower him to sell and convey any real estate of which I may die seized.

In witness whereof, I have hereunto set my hand and seal, this twenty-sixth day of June, in the year of our Lord, nineteen hundred and three.

(Signed) ANNA SMITH MALLETT. [SEAL.]

Signed, sealed, published, pronounced and declared by the Testatrix as and for her last will and testament, in our presence: who, at her request, in her presence, and in the presence of each other, have hereto subscribed our names as witnesses.

LUKE C. STRIDER,
MARY T. STRIDER,
EMMA T. STRIDER,
1450 *Rhode Island Avenue.*

6

Codicil.

In March, 1904, I paid to the Mountain Grove Cemetery Association of Bridgeport, Connecticut, a sum of money sufficient to secure the perpetual care of our family plot in that cemetery, and received a bond for the execution of the same.

Therefore, I hereby revoke clause 2 of the preceding will.

In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King,—to hold in

trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton,—said trusteeship to terminate when these legatees shall receive their portions of my estate.

And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years.

In witness whereof, I have hereunto set my hand and seal, this twenty-third day of June, in the year of our Lord, Nineteen hundred and four.

(Signed) ANNA S. MALLETT.

Signed, sealed, published, pronounced and declared by the Testatrix as and for her last will and testament, in our presence, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

LUKE C. STRIDER,
MARY T. STRIDER,
EMMA T. STRIDER,
1450 *R. I. Ave. N. W.*

Washington City, D. C., June 23, 1904.

Codicil No. 2.

As Lucy M. Keeler of Waterbury, Connecticut, died in April, 1906, I hereby revoke clause 8 of the preceding will.

I give, bequeath and devise to Misses Paulina and Clarissa Hall, both of Chestnut Hill, Trumbull, Connecticut, the sum of One Thousand Dollars, being Five Hundred to each.

In witness whereof, I have hereunto set my hand and seal, this twenty-fifth day of June, in the year of our Lord, Nineteen hundred and six.

ANNA S. MALLETT.

Signed, sealed, published, pronounced and declared by the Testatrix as and for her last will and testament, in our presence;
7 who, at her request, and in her presence, and in the presence of each other, have hereto subscribed our names as witnesses.

LUKE C. STRIDER,
1450 *R. I. Ave. N. W.*
MARY T. STRIDER.
EMMA T. STRIDER.

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

On this 19 day of Nov. A. D. 1907, personally appeared Geo. W. White who, on oath, says that he does not know of any will or codicil of Anna S. Mallett late of said District, deceased, other than

the foregoing instruments of writing dated—Will dated June 26, 1904 Codicil dated June 23, 1904 Codicil dated June 25, 1906; that he received the same from Anna S. Mallett and that said Anna S. Mallett died on or about the 16th day of November, 1907.

GEORGE W. WHITE,
1401 *G Street N. W., Washington, D. C.*

Sworn to and subscribed before me,

M. J. GRIFFITH,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

Demurrer.

Filed June 1, 1909.

In the Supreme Court of the District of Columbia.

No. 28420. Equity.

JEAN L. SHELTON et al.
vs.
FRANK B. KING et al.

The defendants Frank B. King, William H. Saunders and George W. White, demur to the bill of complaint of the above named complainants, and for cause of demurrer show that it appears by the complainants' own showing by their said bill that they are not entitled to the discovery or relief prayed thereby against these defendants; wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants pray the judgment of the court whether they should be compelled to make any answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

E. S. MUSSEY,
J. J. DARLINGTON,
Solicitors for Defendants.

8 The undersigned, solicitors for the defendants in the above entitled cause, certify that, in our opinion, the foregoing demurrer is well founded in law.

E. S. MUSSEY,
J. J. DARLINGTON,
Solicitors for Defendants.

DISTRICT OF COLUMBIA, *ss:*

I, Frank B. King, on behalf of myself and my co-defendants in the above entitled cause, on oath say that the foregoing demurrer is not interposed for delay.

FRANK B. KING.

Subscribed and sworn to before me this 27th day of May, A. D. 1909.

[SEAL.] H. L. RUST,
Notary Public.

Opinion of the Court.

Filed October 18, 1909.

In the Supreme Court of the District of Columbia.

No. 28420. Equity.

JEAN L. SHELTON et al., Complainants,
vs.
FRANK B. KING et al., Defendants.

The complainants in this case claim a legacy under the will of the late Anna Smith Mallett.

The complainant, Jean L. Shelton, is now over the age of twenty-one years, and the complainants Anna Gertrude Shelton and Robert Philo Shelton are infants, suing by their guardian, Mary L. Fairchild.

The said complainants were made the residuary legatees of the said testatrix; and also, by the third paragraph of the will, they were each given the sum of $25,000. By a codicil to the will, trustees were appointed, whose duties were defined as follows: "to hold in trust the legacies devised to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, said trusteeship to terminate when these legatees shall receive their portions of my estate.

It is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

It is charged in the bill that the executor, Frank B. King, has funds in his hands sufficient to pay the said legacies, aggregating $75,000, and that he is about to turn the same over to the
9 trustees named in said codicil. That complainants are advised and charge that the said trust is void, as being in restraint of alienation; or, if not void, that it should be terminated upon the request of the beneficiaries, which request they make. They pray that the said trust may be declared void; or, if not held to be void, that it may be terminated, and the funds paid over to them; and for general relief.

To this bill a general demurrer is filed; and counsel for the defendants claim that the bill discloses no equity or grounds of relief such as prayed for therein.

Counsel for the respective parties agree, and it is evidently a correct conclusion, that the legacies give the said complainants a vested interest in the moneys bequeathed, but they are at issue as to the

time when the moneys are to come into the possession of said legatees.

Counsel for the complainants contend that the provisions of the codicil, attempting to postpone the time for the enjoyment of the possession of these moneys, are inconsistent with their ownership, contrary to public policy, and a restraint on the power of their free disposition, or alienation.

As no other person claims any interest in said legacies, they claim that the complainants have the right to waive the provision made for their benefit, and to have the funds paid to them at this time.

Counsel for the defendants maintain that this provision was made by the testatrix in order to guard the said children, (who are cousins of the testatrix,) against any improvidence on their parts until they have reached the years of sound discretion; and that the property, being the property of the testatrix, she had a right to impose any conditions she saw fit, and that the legatees must accept the legacies with such conditions. That the trust is one that a court of equity will enforce, and require the trustees to invest the funds, and take care thereof, until such time as the testatrix has directed the payment to be made; and that therefore it is an active trust.

The character of the trust, it seems to me, is equivalent to a trust requiring the trustees to hold these legacies, to invest and reinvest, from time to time, the principal and interest, and to allow the fund to accumulate until the youngest child shall reach the age of twenty-five years.

The title to these funds being vested in the legatees at this time, subject to possession being delivered when the youngest child reaches the age of twenty-five years, seems to present a case coming directly within the lines of what is known as a trust for accumulation. The doctrine as to such trusts is stated in 30 Cyc., 1497, in these words:

"If A, owner of property, gives the propery to B to accumulate the income for a stated period, and then to transfer the principal and accumulated income to C, C may, in most jurisdictions, stop the accumulation, and have the property transferred to him at once. The direction to accumulate is an illegal restraint upon C's power of alienation. The law does not allow A to give C the fee, legal or equitable, of property, and then forbid him to alienate it; no more does it allow A to give C the equitable fee in property, and then compel him to allow the property to accumulate. So soon as the rights in property held for accumulation become vested, the direction to accumulate becomes destructible."

Kimball v. Crocker, 53 Maine, 263.

There can be no question but what the testatrix might have provided by her will that these legatees should take a legacy of $25,000 each, with its accumulation, payable when the youngest was twenty-five years of age, if they should be then living otherwise to be paid to other parties, and in that event the title would not have been vested until that time, but would have been contingent on their survival. But where the legacy is vested, and the trust is to accumulate the fund until a definite time, though not beyond the time

allowed by the rule against perpetuities, the legatee, when he becomes of age, may take the fund at his election, thus destroying the trust for accumulation. This proposition is stated in Gray's Rule against Perpetuities, 2nd Ed., Sec. 672, as follows:

"If the person to whom the accumulated income is to be paid has a vested indefeasible right to the possession of the principal or the accumulations, then the direction to accumulate is an illegal restraint on alienation, and such person can put an end to the accumulation at any time."

The states of Massachusetts and Illinois seem to hold to a contrary rule.

Claflin v. Claflin, 149 Mass., 19.
Rhoads v. Rhoads, 43 Ill., 239.

Many of the states have statutes on the subject of accumulation of funds, under which, as a general thing, accumulation can be terminated by the legatee at any time after the legatee reaches the age of twenty-one.

Mr. Gray says in Section 676,

"Income is sometimes directed to be accumulated for the payment of a testator's debts. This gives the creditors an immediate present charge on the property, and they can stop the accumulation at once. The direction to accumulate being therefore destructible, is not void for remoteness."

In Section 120 Mr. Gray says,

"When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void. Thus, suppose property is given to trustees in trust to pay the principal to A when he reaches thirty. When any other person than A is interested in the property; when, for instance, there is a gift over to B if A dies under thirty, the trustees will retain the property for the benefit of B; but when no one but A is interested in the property; when, should he die before thirty, his heirs or representatives would be entitled to it; when, in short, the direction for postponement has been made for A's supposed benefit, such direction is void, in pursuance of the general doctrine that it is against public policy
11 to restrain a man in the use or disposition of property in which no one but himself has any interest."

I am disposed to hold in this case, that the legatee who has now reached the age of twenty-one years is entitled to receive her legacy, with its accumulations, if any; and that the trustees would be entitled and required to hold the legacies going to the infants until such time as they should reach that age, and thereafter elect to accept their legacies, and to give the trustees proper receipts and acquittances.

The demurrer in this case is a general demurrer to the bill, and as the bill, under the view taken by the court, is good as to one of the complainants, it seems to me that the order should be a general order, overruling the demurrer.

JOB BARNARD, *Justice.*

Decree Overruling Demurrer.

Filed October 26, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 28420.

JEAN LOUISA SHELTON et al., Complainants,
vs.
FRANK B. KING et al., Defendants.

This cause, coming on to be heard upon the demurrer of the defendants to the bill of complaint, and having been argued by counsel for the several parties and duly considered, it is now, this 26th day of October, 1909, adjudged that the said demurrer be, and the same is hereby overruled and thereupon the said defendants, by their counsel, in open court, electing to stand upon their said demurrer, and not further to answer the bill of complaint, it is further ordered, adjudged and decreed as follows:

1st. That so much of the codicil of June 23, 1904, to the will of Anna Smith Mallett as postpones the payment of the legacies to the complainants severally, until Robert Philo Shelton shall reach the age of twenty-five years, is null and void, and it appearing that the complainant, Jean Louisa Shelton, has reached the age of twenty-two years, and is entitled to have paid over to her the bequests to her under said last will, it is, therefore, further ordered that Frank B. King, executor under the last will and testament of Anna Smith Mallett, deceased, be, and he is hereby directed to forthwith pay over to the said Jean Louisa Shelton, or to her solicitors of record, one-third part of the distributable assets of said estate now in the hands of said Frank B. King, executor, in money, or if not in money, then in securities at their market value. And it is further ordered that

12 said Frank B. King, as executor, turn over to the trustees in said codicil mentioned, the remaining two-thirds of the distributable assets of said estate, to be by them held in trust until such time as Anna Gertrude Shelton and Robert Philo Shelton shall respectively arrive at the age of twenty-one years, and upon the said Anna reaching the age of twenty-one years to pay over to her her interest in said estate, and upon the arrival of the said Robert at the age of twenty-one years, to pay over to him his part of said estate.

And it is further ordered that the said trustees shall, from time to time, invest and re-invest, under order of this Court, the legacies belonging to the said infants, the income from which shall be paid to the guardian of said infants at such time and in such amounts as this Court, sitting as a Probate Court, may hereafter order.

JOB BARNARD, *Justice.*

The defendants, by their counsel, in open court, appeal from the foregoing decree to the Court of Appeals, and their bond, to act as a supersedeas, is fixed at one thousand dollars, or if for costs only, at one hundred dollars.

JOB BARNARD, *Justice.*

Directions to Clerk for Preparation of Transcript of Record.

Filed October 29, 1909.

In the Supreme Court of the District of Columbia.

No. 28420. Equity.

JEAN LOUISA SHELTON et al.
vs.
FRANK B. KING et al.

The Clerk will please prepare a transcript of the record in the above entitled cause, for appeal to the Court of Appeals of the District of Columbia, for which transcript the following parts of the record are hereby designated:

1. Bill.
2. Exhibit with bill.
3. Demurrer.
4. Opinion of Barnard, Justice.
5. Decree, and memorandum of appeal noted.

J. J. DARLINGTON,
Of Counsel for Defendants.

I agree to the above designation.

HENRY F. WOODARD,
Solicitor for Complainants.

13 *Bond for Appeal to Court of Appeals.*

Filed November 1, 1909.

In the Supreme Court of the District of Columbia.

No. 28420. In Equity.

JEAN LOUISA SHELTON et al.
vs.
FRANK B. KING et al.

Know all men by these presents, That we, Frank B. King, William H. Saunders and George W. White, as principals, and The United States Fidelity & Guaranty Co. a corporation of the State of

Maryland, as surety, are held and firmly bound unto the above named Jean Louisa Shelton, Anna Gertrude Shelton and Robert Philo Shelton in the full sum of one thousand dollars to be paid to the said Jean Louisa Shelton, Anna Gertrude Shelton and Robert Philo Shelton, their executors, administrators, successors, or assigns, To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns firmly by these presents. Sealed with out seals, and dated this 28th day of October, in the year of our Lord one thousand nine hundred and nine.

Whereas the above-named Frank B. King, William H. Saunders and George W. White, Trustees under the will and codicil of Anna Smith Mallet have prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Judgment—Decree—rendered in the above suit by the said Supreme Court of the District of Columbia.

Now, therefore, the condition of this obligation is such, That if the above-named Frank B. King, William H. Saunders and George W. White shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

FRANK B. KING. [SEAL.]
WILLIAM H. SAUNDERS. [SEAL.]
GEO. W. WHITE. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, *Attorney in Fact.*

Sealed and delivered in presence of—
WM. L. SWORMSTEDT.

Approved the 1st day of November, 1909.

JOB BARNARD,
Justice, S. C. D. C.

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28420 in Equity, wherein Jean L. Shelton, et als. are Complainants and Frank B. King, et als. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 15th day of November, 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2085. Frank B. King et al., appellants, vs. Jean L. Shelton et al. Court of Appeals, District of Columbia. Filed Nov. 15, 1909. Henry W. Hodges, clerk.

15 WEDNESDAY, *April 13th, A. D.* 1910.

No. 2085.

FRANK B. KING, WM. H. SAUNDERS, and GEORGE W. WHITE, Appellants,

vs.

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT PHILO SHELTON, by Their Guardian, MARY L. FAIRCHILD.

The above entitled cause was argued by Mrs. E. S. Mussey, attorney for the appellants, and was submitted to the consideration of the Court on the printed record and brief filed herein by Mr. H. F. Woodard, attorney for the appellees.

16 No. 2085.

FRANK B. KING, WM. H. SAUNDERS, and GEORGE W. WHITE, Appellants,

vs.

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT PHILO SHELTON, by Their Guardian, MARY L. FAIRCHILD.

Opinion.

(Mr. Justice Van Orsdel Delivered the Opinion of the Court.)

This cause comes here on appeal from a decree of the Supreme Court of the District of Columbia in an action to terminate a trust created in the last will and testament, and a codicil thereto, of one Anna Smith Mallett, deceased. The material provisions of the will and codicil are as follows:

"3. I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin John Consider Shelton, deceased, all of Bridgeport, Connecticut: the sum of seventy-five thousand dollars, being twenty-five thousand to each."

"10. I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude, and R. Philo Shelton."

Codicil: "In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King,—to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton,—said trusteeship to terminate when these legatees shall receive their portions of my estate.

"And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

It will be observed that these instruments, read together, provide that the appellants, as trustees, shall hold the legacies of each of the appellees, until Robert Philo Shelton, the youngest, shall attain the age of 25 years. It appears from the bill that Robert Philo Shelton was born January 12, 1896, and that only one of the appellees, Jean Louisa Shelton, is of age. One Mary L. Fairchild appears in the capacity of guardian for the two minor children. The trust, by the terms of the will, has about ten and one-half years yet to run, at which time the eldest of the legatees, Jean Louisa Shelton, will be about 35 years old.

The case came before the court below upon demurrer to the complaint. On hearing the court overruled the demurrer, and, the appellants electing to stand on the demurrer, the court entered the following decree:

17 "1st. That so much of the codicil of June 23, 1904, to the will of Anna Smith Mallett as postpones the payment of the legacies to the complainants severally until Robert Philo Shelton shall reach the age of twenty-five years is null and void, and it appearing that the complainant, Jean Louisa Shelton, has reached the age of twenty-two years, and is entitled to have paid over to her the bequests to her under said last will, it is, therefore, further ordered that Frank B. King, executor under the last will and testament of Anna Smith Mallett, deceased, be, and he is hereby, directed to forthwith pay over to the said Jean Louisa Shelton, or to her solicitors of record, one-third part of the distributable assets of said estate now in the hands of said Frank B. King, executor, in money, or, if not in money, then in securities at their market value. And it is further ordered that said Frank B. King, as executor, turn over to the trustees in said codicil mentioned the remaining two-thirds of the distributable assets of said estate, to be by them held in trust until such time as Anna Gertrude Shelton and Robert Philo Shelton shall respectively arrive at the age of twenty-one years, and upon the said Anna reaching the age of twenty-one years to pay over to her her interest in said estate, and upon the arrival of the said Robert at the age of twenty-one years to pay over to him his part of said estate.

"And it is further ordered that the said trustees shall, from time to time, invest and reinvest, under order of this court, the legacies belonging to the said infants, the income from which shall be

paid to the guardian of said infants at such time and in such amounts as this court, sitting as a Probate Court, may hereafter order."

The sole question presented is whether the trust sought to be created by the testator is one in restraint of alienation. The English rule is undoubtedly to the effect that where the testator devises property to a trustee to accumulate the income for a stated period, and then turn over the legacy, together with the income, to a legatee, the legatee may stop the accumulation as an illegal restraint upon his power of alienation. In other words, it is held that a testator can not devise the fee, legal or equitable, to property and withhold from the legatee the power to alienate it. This doctrine of the English courts is founded primarily upon the principle that any trust created in restraint of alienation is against the rule of perpetuities, and for the further and principal reason that creditors of the legatee should be permitted to subject the legacy to the payment of his debts.

The English rule has been followed in some of the States, and repudiated in others. Many of the States, however, have statutes which permit the legatee to terminate the accumulation at any time after he reaches the age of 21 years. The Supreme Court in Nichols v. Eaton, 91 U. S., 716, seems to have departed from the English rule, to the extent of upholding the power of the testator to create such a trust, when it does not come within the rule of perpetuities. The court, while reserving the right to announce a different rule in a case arising in a State where the English rule has been adopted and followed, clearly establishes principles for the guidance of the Federal courts, which are binding on the courts of this District. In that case there was a devise to pay a son of the testator the income of certain property during his lifetime, with the provision, however, that, if he should alienate or dispose of the income to which he was entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, the income could no longer be personally enjoyed by him, but would become vested in or payable to some other person, then the trust, or so much thereof as would so vest, should immediately cease and determine; and, in that event, during the residue of the life of such son, that portion of the income of the trust fund should be paid to the wife and children of such son, and, in default of any objects of the last mentioned trust, the income was to accumulate in augmentation of the principal fund. The son remained single, and became a bankrupt; and the assignee in bankruptcy sought to have the income turned over to him as part of the bankrupt's estate for the benefit of his creditors.

18 The court in holding that the testator had the power to so provide for an accumulation of the income, even to the prejudice of the rights of the creditors of the legatee, said: "But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the

remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all disposition of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, can not so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction."

If a testator can provide a contingency whereby a life estate can cease during the life of a beneficiary, to the prejudice of the creditors of such beneficiary, and be allowed to accumulate, it is not clear why a testator may not provide that a legacy may accumulate for a given period within the rule of perpetuities, and then be transferred to the object of his bounty. Especially is the reason for vesting such power in the testator irresistible where, as in the present case, the appellees are distant relatives, with no claim whatever upon the bounty of the testatrix, and where no rights of creditors intervene. We are unable to understand why the broad equitable principles announced in Nichols v. Eaton, supra, should not be applied to the present case.

The learned justice in the court below in his opinion sought to distinguish the present case from one where the beneficiary has a limited estate with remainder over. He said: "There can be no question but what the testatrix might have provided by her will that these legatees should take a legacy of $25,000 each, with its accumulation, payable when the youngest was twenty-five years of age, if they should be then living, otherwise to be paid to other parties, and in that event the title would not have been vested until that time, but would have been contingent on their survival. But where the legacy is vested and the trust is to accumulate the fund until a definite time, though not beyond the time allowed by the rule against perpetuities, the legatee, when he becomes of age, may take the fund at his election, thus destroying the trust for accumulation." The income of a fixed legacy during the life of the life

tenant for the express purposes of the bequest, is as absolutely vested as a fixed legacy devised to a legatee to be turned over to him at a given date. While the rights of the legatee absolutely vest
19 on the death of the testator, we can perceive no sound reason why the testator, acting within the limitations of the rule against perpetuities, may not provide as a condition of the gift that it shall be transferred to the beneficiary at a future date.

In Rhoads, Exr., v. Rhoads, 43 Ill., 239, the court, considering a devise similar to the one here in question, said: "We are at a loss to perceive, if a testator can select the objects of his bounty, why he can not also prescribe the time and mode in which that bounty shall be enjoyed; provided, always, in so doing, he contravenes no well recognized and admitted principle of public policy, or stubborn rule of right. From the earliest times courts of justice have set themselves against such a disposition of property by will as would have the effect to tie up the land and capital of the country, obstructing thereby the free and active circulation of property, checking the improvement of the land and rendering its acquisition difficult, and, in short, to every disposition of it savoring of a perpetuity, which the law abhors. Yet, notwithstanding this, it has never been denied, so far as we are advised, that an executory limitation to a life or any number of lives in being, and twenty-one years afterward, is valid. Can it be doubted that a testator, with a family of children, some of them grown, married and settled in life, and others of them infants, may devise his estate to executors with power to sell and convert it into money to be put at interest, and so remain until the youngest child, then not one day old, shall arrive at full age, and then the fund to be divided equally among all the children? In such case, which is but an ordinary limitation in strict settlement, no court would hold that it was void for remoteness, yet, the time of enjoyment by the beneficiaries is more remote than that fixed by this will."

None of the reasons for the English custom prevail in this country. As to the legatee, he has no such claim upon the bounty of the testator as will require a court in equity and good conscience to subvert the will of the testator and turn a legacy over to perhaps a profligate or wasteful legatee when such a contingency has been wisely provided against in the will. The legacy is a gift, and no good reason is apparent why a testator, acting within the bounds of public policy, may not impose any reasonable limitation upon the enjoyment of the gift which his judgment may dictate. As to the creditors, the will is a matter of record, notice to all persons of its terms and conditions, and whoever elects to extend credit to a suspended legatee does so at his risk and can not be heard to complain.

The decree is reversed with costs, and the court is directed to enter an order vacating the decree and dismissing the bill.

Reversed.

20 WEDNESDAY, *November 2d, A. D.* 1910.

No. 2085, October Term 1910.

FRANK B. KING, WM. H. SAUNDERS, and GEORGE W. WHITE, Appellants,

vs.

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT PHILO SHELTON, by Their Guardian, MARY L. FAIRCHILD.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court with directions to enter an order vacating the decree and dismissing the bill.

PER MR. JUSTICE VAN ORSDEL.

November 2, 1910.

21 FRIDAY, *November 4th, A. D.* 1910.

No. 2085.

FRANK B. KING, WM. H. SAUNDERS and GEORGE W. WHITE, Appellants,

vs.

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT PHILO SHELTON, by Their Guardian, MARY L. FAIRCHILD.

On motion of Mr. H. F. Woodard, attorney for the appellees in the above entitled cause, It is ordered by the Court that said appellees be allowed an appeal to the Supreme Court of the United States and the bond for costs is fixed at the sum of three hundred dollars.

22 In the Court of Appeals of the District of Columbia, April Term, 1910.

No. 2085.

FRANK B. KING, WILLIAM H. SAUNDERS and GEORGE W. WHITE, Appellants,

versus

JEAN L. SHELTON and ANNA GERTRUDE SHELTON and ROBERT Philo Shelton, by Their Guardian, Mary L. Fairchild, Appellees.

Assignment of Errors to the Supreme Court of the United States.

First. The Court of Appeals erred in reversing the decree of the Supreme Court of the District of Columbia and remanding said cause to have said decree vacated and the bill dismissed.

Second. In not affirming the decree of the Supreme Court of the District of Columbia.

Third. In failing to declare the trust under the last will and testament of Anna Smith Mallett, deceased, void.

Fourth. In not holding that Jean Louisa Shelton had the right to terminate the said trust.

Fifth. In not holding that it was the duty of the executor, Frank B. King, to pay over at this time to the said Jean Louisa Shelton the amount of legacy due her, and also to pay to the other children as they respectively arrive at the ages of 21 years, the legacies due them under the said last will and testament.

Sixth. In not holding that the attempted postponement of the payment of the legacies to the legatees was a restraint on their free disposition or alienation of the same, and therefore void.

Seventh. In not holding that the legatees under the said
23 will and codicils thereto annexed took a vested and fixed interest in their legacies and in not holding that they had the right to have the present enjoyment of the same.

HENRY F. WOODARD,
Att'y for Jean L. Shelton and Gertrude Shelton and Robert Philo Shelton, by Their Guardian, Mary L. Fairchild, Appellants to the Supreme Court of the United States.

(Endorsed:) No. 2085. Frank B. King, et al. vs. Jean L. Shelton, et al. Assignments of error to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Nov. 9, 1910. Henry W. Hodges, Clerk.

24 *(Bond on Appeal.)*

Know all Men by these Presents, That we, Jean Louisa Shelton, and Mary L. Fairchild, guardian of Anna Gertrude Shelton and Robert Philo Shelton, minors, as principals, and American Bonding Company of Baltimore, as surety, are held and firmly bound unto Frank B. King, William H. Saunders and George W. White in the full and just sum of Three hundred dollars, to be paid to the said Frank B. King, William H. Saunders and George W. White their and each of their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 25 day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Frank B. King, William H. Saunders and George W. White, appellants and Jean L. Shelton and Anna Gertrude Shelton and Robert Philo Shelton, by their guardian, Mary L. Fairchild, appellees, a decree was rendered

against the said Jean L. Shelton, et al., appellees, and the said Jean L. Shelton, et al., appellees, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Frank B. King, William H. Saunders and George W. White, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Jean L. Shelton and Mary L. Fairchild, guardian for Anna Gertrude Shelton and Robert Philo Shelton shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JEAN LOUISA SHELTON. [SEAL.]
MARY L. FAIRCHILD. [SEAL.]
Guardian of Anna Gertrude Shelton, Robert Philo Shelton.
AMERICAN BONDING COMPANY OF BALTIMORE. [SEAL.]
By THOS. J. DE LASHMUTT.
Attorney in Fact.

[Seal of American Bonding Company of Baltimore.]

Sealed and delivered in presence of—
CHAS. S. CANFIELD.
JESSIE LOUNSBURY.
JOHN LANE JOHNS.

Approved by—
JOSIAH A. VAN ORSDEL,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2085. Frank B. King, Wm. H. Saunders and George W. White, Appellants, vs. Jean L. Shelton and Anna Gertrude Shelton and Robert Philo Shelton by their guardian Mary L. Fairchild. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 26, 1910. Henry W. Hodges, Clerk.

25 UNITED STATES OF AMERICA, *ss:*

To Frank B. King, Wm. H. Saunders and George W. White, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Jean L. Shelton and Anna Gertrude Shelton and Robert Philo Shelton, by their Guardian Mary L. Fairchild are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected,

and why speedy justice should not be done to the parties in that be
half.

Witness, the Honorable Josiah A. Van Orsdel, Associate Justic
of the Court of Appeals of the District of Columbia, this 26th day o
November, in the year of our Lord one thousand nine hundred an
ten.

JOSIAH A. VAN ORSDEL,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 28th day of November A. D. 1910.

E. S. MUSSEY,
Att'y for King et al.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov
28, 1910. Henry W. Hodges, Clerk.

26 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District
of Columbia, do hereby certify that the foregoing printed and type-
written pages numbered from 1 to 25 inclusive contain a true copy
of the transcript of record and proceedings of said Court of Appeals
in the case of Frank B. King, Wm. H. Saunders, and George W.
White, appellants, vs. Jean L. Shelton and Anna Gertrude Shelton
and Robert Philo Shelton, by their Guardian Mary L. Fairchild No.
2085, October Term, 1910, as the same remains upon the files and
records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the
seal of said Court of Appeals, at the City of Washington, this 28
day of November A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,427. District of Columbia Court
of Appeals. Term No. 454. Jean L. Shelton and Anna Gertrude
Shelton and Robert Philo Shelton, by their guardian, Mary L. Fair-
child, appellants, vs. Frank B. King, Wm. H. Saunders, and George
W. White. Filed December 1st, 1910. File No. 22,427.

2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 180.

JEAN L. SHELTON AND ANNA GERTRUDE SHELTON AND ROBERT PHILO SHELTON, BY THEIR GUARDIAN, MARY L. FAIRCHILD, *Appellants.*

vs.

FRANK B. KING, WILLIAM H. SAUNDERS, AND GEORGE W. WHITE, *Appellees.*

BRIEF FOR APPELLANTS.

HENRY F. WOODARD,
ARTHUR A. BIRNEY,
Attorneys for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 180.

JEAN L. SHELTON AND ANNA GERTRUDE SHELTON AND ROBERT PHILO SHELTON, BY THEIR GUARDIAN, MARY L. FAIRCHILD, *Appellants.*

vs.

FRANK B. KING, WILLIAM H. SAUNDERS, AND GEORGE W. WHITE, *Appellees.*

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

ARGUMENT.

I.

The appellants filed their bill in the Supreme Court of the District of Columbia to terminate an alleged trust under the last will and testament of Anna Smith Mallett, deceased, and a codicil thereto. The paragraphs in the will and codicil which are involved in this suit are:

Third Item: "I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin, John Consider Shelton, deceased, all of Bridgeport, Connecticut; the sum of Seventy-five thousand dollars, being Twenty-five thousand to each."

Tenth Item: "I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude and R. Philo Shelton."

Codicil June 23, 1904:

"In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King—to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton—said trusteeship to terminate when these legatees shall receive their portions of my estate.

"And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

On the part of the appellants it is contended that they *took a vested and fixed interest in their legacies, and that the attempt to postpone the time for the enjoyment of the same is inconsistent with their ownership, contrary to public policy, and a restraint on the power of their free disposition or alienation, and is, therefore, void. They also assert that no other person claims any interest in the legacies, and that they may rightfully waive the provision made for their benefit and have the fund paid to them at this time.*

Counsel for the respective parties *agree that the legacies give the appellants a vested interest* in the moneys be-

queathed, so that the only point in controversy is when the fund is to be paid over.

Johnson, et al., vs. Washington Loan & Trust Company (decided by this Court, April 1, 1912):

The Court said:

> "The fact that the property was directed to be sold and that they were described as distributees of the proceeds *did not postpone* the vesting of the interest."

The Court then proceeds to quote from McArthur vs. Scott, 113 U. S., 340-380:

> "For many reasons, not the least of which are that testators usually *have in mind the actual enjoyment* rather than the technical ownership of their property and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be *contingent upon a future event.* Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. * * * So a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest." In Cropley vs. Cooper, *supra*, the testator bequeathed the rent of his house to his daughter for her life, and it was provided that at her decease the property should "be sold, and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years, and interest in the meantime to be applied to their maintenance."

> When the testator died, his daughter, who survived him, had one son about three years old. It was held that the son took a vested interest at the death of the testator. The court said: "A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate, or to let in some other interest. In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior devise or bequest. A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator."

It can not be gainsaid that if either of the parties (legatees) should decease, that his or her personal representatives would inherit his or her legacy, unless otherwise disposed of by will; also should either of them suffer a judgment to be rendered, execution might be had against the funds in the possession of the trustees at once and without reference to the age of the youngest child; also the fund might be assigned by the legatees; also should Robert decease before he reached the age of 25 years the fund would become immediately payable. *It therefore appears that the legatees took a vested and indefeasible interest in their legacies and that by no known process of human laws could they be defeated in the enjoyment of the same.* No contingency could arise which could affect their rights, so that it must be admitted that they, and they only, are the only persons who have any interest, claim or right in the fund. In this situation may the legatees, if they so desire, presently enjoy their gifts? What sound reason can be urged against their present enjoyment? None, we submit, because, if it was the intention of the testatrix to provide against their improvidence she signally failed in that intention because the objects of her bounty could ac-

complish by indirection what the appellees now contend they may not now directly do. What more easier way than to assign their rights or suffer a judgment to be taken against them? In the case of Rector vs. Dalby, 98 Mo. App., 189, one of the reasons assigned by the court for holding such a trust void was that, *"The court will not subject him to the disadvantage of raising money by this means when the fund is absolutely his own."* The only reason that can be urged in favor of the postponement is that the legatees might extravagantly spend their legacies. This, however, they could accomplish in other ways and before the youngest child reached the age of 25 years, if they were so disposed. (See 2 Dillon's Repts., 6.)

There are some disadvantages which the legatees would suffer, apart from the inconvenience that would follow their not having the use of the money. First: They would be subjected to the expenses of the trusteeship which, in itself, would be burdensome. Secondly: The adult legatee (now in her twenty-fifth year) would be deprived of the enjoyment of her portion of the fund, and of the income thereon, during a period of her life when it would be of the greatest advantage to her.

The will makes no provision with reference to the income or accumulations. *It is merely a dry, naked trust.* The fund is not given to the trustees to be by them held, but the gifts are to the children. The only function of the trustee is to lock the fund up and keep the legatees from any participation therein until the youngest reaches the age of 25, all of which is equivalent to reading into the will, "I absolutely give each of you Twenty-five thousand dollars, but you are not to have it," because that must necessarily be the logical conclusion if, by misfortune, any one or all of the legatees should decease before the fund is paid over to them.

II.

It is Settled Law That Such Trusts Are Void, or if Not Void, Voidable.

English Rule.

In the case of Saunders vs. Vautier, 4 Beavans Rep., 115, it was held that where a legacy is directed to accumulate, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

In this case the testator, by his will—

> "gave to his executors and trustees * * * all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue thereon, until Daniel Wright Vautier should attain his age of 25 years"—

and then to pay it over. When Vautier reached the age of 21 years he petitioned to have the fund. The Lord Chancellor held the legacy vested and ordered the transfer.

In Wharton vs. Masterson, Appeal Cases, 1895, House of Lords, page 186, it was held:

> "Where there is an absolute vested gift, made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest but the legatee; in other words, the court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. This is the principle of Saunders vs. Vautier, and it is as applicable where the legatee is a charity as where he is an individual."

Opinions were given by Lord Herschell, Macnaughton, and Davey. We quote the following from the opinion of Lord Davey:

"I am, therefore, of opinion that the annuitants have no charge upon the surplus income, or the investments of it, or the income derived from such investments, all of which, I think, are included in the accumulations, and the charities have a vested title free from any claim by any other person to the surplus income; but according to the direction of the will, their enjoyment is postponed to the death of the survivor of the annuitant, and an accumulation is directed in the meantime.

"This being so, the principle of Saunders vs. Vautier (1) would at once be applicable if this were the case of a gift to an individual. That principle is this: That where there is an absolute vested gift, made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. The principle is stated as well as elsewhere, by Lord Hatherley in the passage from his judgment in Gosling vs. Gosling, which was read by Lindley, L. J., in the Court of Appeal. There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or who can complain of its non-execution. The reason for the rule has been variously stated. It may be observed, however, that the court of chancery always lent against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest."

In the case of Josslyn against Josslyn, 9 Sim., 64, it was decided:

> "That when certain moneys were to be paid to a legatee upon his arriving at twenty-four years of age that he is entitled to have this fund paid to him on his arriving at twenty-one, because the whole equitable interest was in him at that time."

Mr. Marsden, in his work on Perpetuities and Accumulations, p. 206, states the rule as follows:

> "For it is a rule of law that where a person has an absolute vested interest in property, and can give a discharge for it, he is entitled to an immediate transfer, notwithstanding any words purporting to restrict the right to possession, and even though the direction is to pay or transfer at a future time.
>
> "The rule was so stated by Malins, V. C., in a recent case, Hilton vs. Hilton, L. R., 14 Eq., 648, following the well-known decision in Saunders vs. Vautier."

Mr. Gray, in his thorough and painstaking work on perpetuities, at section 120, lays down the rule in the following language:

> "One result of the invalidity of restraint on alienation calls for attention in connection with the rule against perpetuities. When a person is entitled ***absolutely*** to property any provision postponing its transfer or payment to him is void. Then suppose property is given to trustees in trust to pay the principal to A when he reaches thirty. When any other person than A is interested in the property, for instance, there is a gift over to B if A dies under thirty, the trustee will retain the property for the benefit of B, but when no one but A is interested, and he should die before thirty, his representatives would be entitled, when, in short, the

direction for postponement has been made for A's supposed benefit such direction is void."

In this text it will be observed that the distinction is drawn between a trust in which one person alone is interested *and a trust where there is a contingent gift over to another person.* (Such as in the cases relied upon by the appellees.)

See, also:

Re Jacob's Will, 29 Beav., 402.
Rocke vs. Rocke, 9 Beav., 66.
Jackson vs. Marjoribanks, 12 Sim., 93.
Craxton vs. May, L. R., 9 Ch. Div., 338.
Magrath vs. Morehead, L. R., 12 Eq., 491.

American Rule.

In Vol. 22, 2d Edition, American & English Ency. of Law, 735, the rule is thus stated:

"If a present vested interest in either the principal or the accumulations is given to the person to whom the accumulated income is to be paid, then the beneficiary may, apart from any statute on the subject, stop the accumulation at any time, the direction therefore being an illegal restraint on the alienation."

In Vol. 30, Cyc., 1497, the rule appears thus:

"If A, owner of property, gives the property to B to accumulate the income for a stated period, and then to transfer the principal and accumulated income to C, C may, in most jurisdictions, stop the accumulation, and have the property transferred to him at once. The direction to accumulate is an illegal restraint upon C's power of alienation. The law does not allow A to give C the fee, legal or equitable, of property, and

> then forbid him to alienate it; no more does it allow A to give C the equitable fee in property and then compel him to allow the property to accumulate. So soon as the rights in property held for accumulation become vested, the direction to accumulate becomes destructible."

In Rector vs. Dalby, 98 Mo. App., 189—

> "Where a legatee has an absolute interest in a defined fund so that according to the ordinary rule he would be entitled to receive it on attaining his majority, but by the terms of the will payment is postponed to a later date, the courts will order a payment of the fund on his attaining his majority."

At the bottom of page 192, the court, in its opinion, says:

> "It is claimed by the plaintiff that where the testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining his majority, but by the terms of the will, payment is postponed to a subsequent period, for instance, until he attains the age of 25 years, the court will, nevertheless, order payment on his attaining his majority, for at that age he has the power of charging or selling it, and the court will not subject him to the disadvantage of raising money by this means when the fund is absolutely his own."

The court then refers to and adopts the decision in Saunders vs. Vautier, and at the conclusion of the opinion refers to the Claflin case (149 Mass., 19) in the following language:

> "As was stated in the Claflin case, ante, the weight of authority is in favor of the plaintiff's right of re-

covery, and as we are not convinced by the reasons given in that case for a different ruling, we have concluded to adopt the plaintiff's theory, as it seems to be supported not only by the greater weight of authority, but by that of sounder reason."

In Sears vs. Choate, 146 Mass., 395, the facts were that Joshua Sears died leaving an only child, then a minor, and a will which named three persons as executors and trustees. To these trustees, their heirs and assigns, he gave all the rest and residue of his estate to hold in trust, invest, manage and take care of in a manner pointed out. The testator then provided that when his son reached 21 years of age he should be paid $4,000 annually; when he was 25 years of age, $6,000 a year, and when he was 30 he was to be paid $10,000 annually. The question was whether the trustees should retain the principal out of which the $10,000 annuity arose, and continue to pay the annuity or whether the beneficiary was entitled to both the principal and the annuity.

This case is parallel to the case at bar. The entire beneficial interest was in the son, while in our case the entire beneficial interest is in the three children.

The court said:

"The trustees now hold the trust estate upon the simple trust * * * to pay the plaintiff $10,000 per year. There is in the will no limitation over of the estate in any contingency to any other person; there is no discretion given to the trustees and there is no provision that the income or the estate shall not be alienable by the plaintiff or attachable by his creditors. It can not be doubted that under this will the plaintiff took an equitable estate which he might alienate and which equity would apply to the payment of his debts. Sparhawk vs. Cloom, 125 Mass., 263.

"It is said in the opinion in the former case, that 'it is conceded by all parties that, in order to carry out the plain intention of the testator to secure to his son an honorable support, during his life, not exposed to the risk of his improvidence or misfortunes, the trustees should retain in their hands enough of the estate to produce beyond question the annuity provided for in the will.' It is quite probable that the testator had this idea or intention in his mind; but if he had, he failed to frame his will in such a way as to carry out his intention. This court has held that the founder of a trust may give an equitable life tenant a qualified estate in income which he can not alienate and which his creditors can not reach. Broadway Natl. Bank vs. Adams, 133 Mass., 170. But in order to give such a qualified estate, instead of an absolute one, the language of a founder must be clear and unequivocal to that effect. Taking his will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate both in the income and in the corpus of the trust.

"There is no doubt of the power and duty of the court to decree the termination of a trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination. Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary. Smith vs. Harrington, 4th Allen, 566; Bowditch vs. Andrew, 8 Allen, 339; Inches vs. Hill, 106 Mass., 575; Stone, petitioner, 138 Mass., 476; Underwood vs. Boston Five-Cent Savings Bank, 141 Mass., 305.

"In the case before us the trustees hold the fund in question upon a simple trust; the plaintiff is the absolute equitable owner of the fund and the income; he may alienate them and they can be reached by his creditors. If the testator had the intention of guard-

ing against his possible improvidence or misfortune, he failed to carry his intention into effect, and thus the reason for the existence of a trust fails.

"We are of opinion that the plaintiff is entitled to a decree terminating the trust, according to the prayer of his bill."

This case can not be distinguished from the case at bar. If the son had the right to terminate the trust at 30 years of age he might have terminated it at 21 years, and the mere fact that he did not apply until he was 30 does not affect the rule of law laid down by the court that—

"where property is given to certain persons for their benefit and in such a manner that no other person has or can have any interest in it, they are, in effect, the absolute owners of it, and it is reasonable and just that they should have the control and the disposal of it, unless some good cause appears to the contrary."

In the case of Bennett vs. Chapin, 77 Mich., 526, the rule is stated in the syllabus as follows:

"In this case it is held that the complainant is the only person interested in the land devised to her in the will sought to be construed, and that the condition in said will in restraint of alienation is void."

At page 537 the court said:

"The restraint upon the alienation evidently was made solely for the benefit of the devisee. Why may she not now forego or release its performance? It may be contended that the executors named in the will, had they accepted the trust and assumed control of the estate, might have insisted on holding the estate in possession until the period when the complainant by the terms of the will was to take in possession. *This,*

however, was a mere naked trust and one personal to the parties named. This trust they refused to accept, and the trustees are now dead. Who can complain if the devisee now takes in possession and sells, and disposes of the entire estate? It is well settled that when a bare power of sale is given to the executors merely to sell the lands for the purpose of paying over the proceeds to devisees whose right under the will to such proceeds is an absolute vested right, all such devisees may collectively, before the power of sale is exercised, elect to take the land instead of the proceeds and thus prevent a sale.

"But we are satisfied that the restraint upon alienation contained in this will is void. Such restraints are not favored in law. It is true that many restrictions or qualifications upon the rights of a devisee or grantee may be made effective by making the estate itself dependent upon such condition; *but when the estate granted is absolute,* such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance of a violation of the restriction can neither promote nor prejudice any interest but their own.

The court cites:

Mandlebaum vs. McDowell, 29 Mich., 87.
Hall vs. Tufts, 18 Pick., 459.
Bank vs. Davis, 21 Pick., 42.
Brandon vs. Robinson, 18 Ves., 429.
Doblers Appel., 64 Pa. St., 9.
Craig vs. Wells, 11 N. Y., 315.

And then proceeds:

"Aside from these reasons, however, we think the restriction upon the sale can not be upheld. No such restrictions are valid."

It was attempted by opposing counsel to lessen the dignity and weight of this case by an allusion to the fact that the trustees had never entered upon the trust and were dead at the time of the application, but if the court will read the opinion, it will see that the court, quite apart from any attending circumstances, holds, "*that the restraint upon alienation contained in the will is void, such restraints not being favored in law.*" The court approves the doctrine laid down in Mr. Gray's work, in fact *section 120 is adopted in its entirety.*

In Huber vs. Donoghue, 49 N. J. Eq., 125, the clause of the will under discussion reads as follows (page 126):

> "I do direct that my said executors shall, out of the proceeds of the sales above mentioned and the rents, issues and profits of such properties and investments shall be applied so far as necessary, to the maintenance of my wife and unmarried children during the period of ten years next succeeding my death; and at the expiration of said ten years (after the sale last above mentioned) all the moneys or investments then remaining in the hands of my said executors shall be divided equally, share and share alike, between my wife and my children, who survive me."

The Vice-Chancellor adopts the rule laid down in Sears vs. Choate, *supra.* The Huber case was decided after the decision in the Claflin case, so that it may not be said that the Vice-Chancellor, when deciding the Huber case, could not have had the benefit of the Claflin case.

The court's attention is directed to the case of Sanford, assignee, vs. Lackland, et al., 2 Dillon's Rep., 6.

> "A testator gave to trustees an estate for the benefit of his son, and with directions that the trustees should hold it and its accumulations until the son should reach

> the age of 26 years; he was adjudged a bankrupt at the age of 24 years. Held that the assignee in bankruptcy, as against the bankrupt, was entitled to the property held by the trustees."

In Brandon vs. Robinson, 18 Ves., 429, the property was in trust with directions to pay income to A for life, with remainder over to B. A was adjudged a bankrupt and his trustee took the income.

See, also, Kimball vs. Crocker, 53 Maine, 263.

The Claflin case, 149 Mass., 19, was decided in 1889. The court does not disapprove of the doctrine laid down in the Sears case, 146 Mass., 395. The opinion goes on to say that:

> "There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it; and the authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of 21 years would be treated void by those courts which hold that restrictions against the alienation of absolute interests in the trust property are void. *There has indeed been no decision of this question in England by the House of Lords, and but one by a chancellor.*"

Since this decision the House of Lords has passed upon the exact question.

Wharton vs. Masterson Appeal Cases, 1895, *supra.*

In the Claflin case the court, in concluding its opinion, said:

> "Other provisions for the plaintiff are contained in the will apparently sufficient for his support."

And it may be that that was one of the reasons which influenced the court not to follow the rule laid down in the Sears case, *supra*. The New Jersey court refused to follow the Claflin case and so did the Missouri Court of Appeals, *supra*.

In the case of Rhoads vs. Rhoads, 43 Ill., 239, cited in the opinion of Mr. Justice Barnard (as holding contra to our contention), the court said, after referring to the English cases cited:

> "We are at a loss to perceive the analogy between these cases and the one now before us. In this case we are not dealing with legacies * * * but are called upon to uphold or overthrow the scheme adopted by the testator for the disposal of his whole estate. No legacy is left to anyone."

The devises in this case were to the executors and trustee, whose duties were active. In the case at bar the legacies are to the children direct. In the one case the legacies vested—in the other not.

III.

The Rule as Contended for by the Appellees and the Authorities Cited do not Sustain Their Position.

An attempt is made to confuse a rule of law laid down in a number of cases, cited by appellees, with that involved in the case in hand. That there may be no misunderstanding about this, we shall endeavor to succinctly state the two rules, and first as to the rule for which appellants contend, viz.:

Where a gift is to "A" absolutely, but the time for receiving it is postponed, then the attempted postponement is destructible.

This is the rule as laid down by Mr. Gray, and there is nothing in his work to challenge the correctness of the same. As has been shown, it is the rule laid down by the House of Lords and by a number of the American courts.

The other rule, and the one for which appellees contend, is, viz.:

WHERE A GIFT IS TO "A," WITH PROVISION THAT SHOULD HE BECOME BANKRUPT OR SOME OTHER CONTINGENCY HAPPEN THE FUND SHOULD PASS TO OTHERS, THE TRUST IS NOT DESTRUCTIBLE.

For many years there was a controversy with regard to spendthrift and improvident trusts, and it was that question which was decided in the case of Nichols vs. Eaton, to which we shall hereafter refer.

Where some other person than the legatee has an interest in the fund, of course the trust is active, and the legatee may not terminate the trust and take the fund and thus defeat the remainderman; *but where the only person in interest has a vested and indestructible interest the legatee may anticipate or put an end to the postponement.* In the case under consideration no other persons have an interest in the fund but the legatees.

We shall now take up the authorities relied upon by appellees and show that they do not apply to the rule as announced by Mr. Gray, but, on the other hand, relate to an entirely different proposition.

The first case is that of Nichols, assignee, vs. Eaton, et al., 91 U. S., 716. In this case there was a devise to trustees to pay over the income to A with the provision that if he should become bankrupt or insolvent the trust should cease and determine and the income pass to others. This, therefore, was a trust upon a contingency on which other persons had an interest upon the happening of that contingency. The assignee in bankruptcy of A sought to ob-

tain the moneys in the hands of the trustee as the property of A but the court held that the bankruptcy or insolvency of A terminated all his legal vested right in the estate.

This case may be used as an example by which to illustrate the difference between an estate which had fully vested in the beneficiary (such as the one at bar) and which could not be divested, and an estate in which upon the happening of a contingency, the estate was defeated. In the present case, if any one of the children should become bankrupt, all the money in the hands of the trustees would immediately pass to the trustee in bankruptcy.

This is one of the cases that appellees cite as overruling the text of Mr. Gray, but which we respectfully submit, is entirely foreign to the doctrine set forth by Mr. Gray. In the one case, nothing could defeat the right of the children to take the estate vested in them, while in the other, insolvency of the beneficiary destroyed the right to take. In this case there was an active trust to support the contingent rights of those who might take if the contingency happened. In our case the trust is a dry or naked one with nothing for the trustees to do.

Even in the Claflin case, 149 Mass., 19, which is so greatly relied upon by the other side, the court said: "This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust."

Another case cited is Hyde vs. Woods, 94 U. S., 523-526. In this case a provision in the constitution of a stock and exchange board provided that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he was indebted * * * was held not to be contrary to public policy, nor in violation of the Bankruptcy Act. This case has no application to the

question involved in our case. The broker (in the Hyde case) agreed, when he purchased the seat, to certain conditions, which conditions the court held not to be contrary to public policy, or in contravention of the Bankruptcy Act.

Another case is that of Cowell vs. Springs Co., 100 U. S., 55-57:

> "A condition in a deed conveying land that intoxicating liquors shall not be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort thereon, and that if this condition be broken by the grantee, his assigns or legal representatives, the deed shall become null and void, and the title to the premises revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy."

The court said—

> "the validity of the condition was assailed by the defendant as repugnant to the estate conveyed. * * * That the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate."

In this case there was a condition, upon the happening of which the estate reverted to the grantor. If Miss Mallett had imposed a condition in her will that if Miss Jean Shelton should decease before Robert arrived at the age of 25, that the fund go to another, of course the condition would have been valid, but there is no condition in her will, no other persons have any interest but the children. In the case in 100 U. S., there was another person other than the grantee who had an interest, to wit, the grantor, upon the happening of a certain contingency. We submit that this case does not support appellees' contention.

The case of Mades vs. Miller, 2 D. C. App., 455, simply determines that executors, who have in their hands money belonging to the distributee of an estate, are chargeable with interest thereon if they make use of it themselves, or are negligent either in not paying the money over or in not investing it or loaning it so as to render it productive. What application this case can have to influence the question of a restraint of alienation is difficult to appreciate.

Another case cited is that of Smith vs. Towers, 69 Md., 77. The trust in that case was (page 78):

> "That he shall pay, or cause to be paid unto my dear son * * * as the same may accrue, the net rents, income and profits arising from said farm and property, after deducting such sums of money as may be necessary to satisfy and pay taxes and assessments levied thereon, and needful repairs to buildings and fencing * * * the said net rents, income and profits to be paid to the said Robert J. W. Carey (into his own hand and not into another's whether claiming by his authority or otherwise), so long as he shall live, etc.; then in trust to convey the same in fee simple to the children or descendants of said Robert."

It will be seen from the terms of this trust estate the son had a life estate in the income, with remainder over. The court said:

> "Here, then, is an express provision that the income shall be paid to his son, and an express prohibition against paying it to any other person. * * *"

And at page 86:

> "In Vermont, Connecticut, and Kentucky the highest courts have held that the income of property may be devised in trust for the benefit of the cestui que

trust for life to the exclusion of the claims of creditors."

The Maryland court adopts this view. This case, like the others cited by opposing counsel deals with a limitation, and is not apropos to nor decisive of the right of the Shelton children to take their legacies at this time. Of course, young Carey would have had no right to put an end to the trust, because after his death the corpus of the estate went to his children under the will.

The other cases cited by appellees fall under one of two heads, viz.:

First. Where the beneficiary has a limited estate with remainder over.

Second. Where a spendthrift trust is created.

They are the following:

Roberts vs. Stevens, 84 Maine, 331 (spendthrift trust).

Mason vs. Trust Co., 78 Conn., 81 (spendthrift trust).

Guernsey vs. Lazzear, 51 W. Va., 328 (estate for life, remainder over).

Leigh vs. Harrison, 69 Miss., 923-924 (estate for life in income, remainder over).

It would serve no useful purpose to refer to other cases cited by appellees, because upon examination it will be seen that they fall under the classes of cases above referred to.

In the case at bar we deal with vested legacies. In the cases cited by appellees the legatees or beneficiaries do not take vested interests at all. Either they take the estate for life, or a fixed period, with a remainder over, or they take an interest in the income for life or for a fixed period, with remainder over, or they take no interest at all, the trustees

having a discretionary power to pay or not pay them a part or the whole of the income as they see fit. Therefore the striking differences between the classes of cases may be said to depend upon the question—whether or not the estates or legacies are vested, and if vested—whether they may be defeated by the happening of some event or contingency. The reason for the distinction would seem to be that in some cases other persons may have an interest, while in that class with which we deal, no other person can have an interest. Should you seek to destroy the postponement in the former class the corpus would be subjected to risk, which might result in loss to the remainderman, while in the latter class no one can be injured, as no other person has a claim.

View Taken by the Court of Appeals.

The learned justice who wrote the opinion in the Court of Appeals of the District of Columbia admits that the English rule is as contended for by the appellants in this Court. Also that the English rule has been followed in some of the States, but concludes that that court is bound by the utterances of this court as those utterances are contained in the case of Nichols vs. Eaton, *supra*, for which reason the last appellate court found itself bound to reverse the lower court.

We must respectfully dissent from the construction, or rather application, of the decision of Nichols vs. Eaton as given it by the Court of Appeals. In our view the will in the case of Nichols vs. Eaton is absolutely dissimilar from the will under discussion in this case. In the former case—

> There was a devise to pay a son of the testator the income of certain property during his lifetime with the provision, however, that, if he should alienate or

> dispose of the income to which he was entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, the income could no longer be personally enjoyed by him, or would become vested in or payable to some other person, then the trust, or so much thereof as would so vest, should immediately cease and determine; and, in that event, during the residue of the life of such son, that portion of the income of the trust fund should be paid to the wife and children of such son, and, in default of any of the objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

In the case at bar there is no limitation over and no one has any interest in the legacies other than the appellants. It seems to us that the true test is that in the former case there is not a *vested interest* while in the latter case there is, or if the income was vested it was subject to be divested upon the happening of the contingency provided against. It is plain to be seen that in the case of Nichols vs. Eaton the son could not have assigned away or otherwise disposed of his interest, while it is equally clear that in the case at bar the appellant could, if she saw fit, assign away her vested estate in the legacies. It is equally true that in the case of Nichols vs. Eaton the legacy to the son could not be reached by execution while on the other hand in the case at bar any one holding a judgment against the appellant could at once reach the fund in the hands of the trustees. The case of Sears vs. Choate emphasizes this reason.

> "There is in the will no limitation over of the estate in any contingency to another person; there is no discretion given to the trustees and there is no provision that the income or the estate shall not be alienable by the plaintiff or attachable by his creditors. * * *
>
> "There is no doubt of the power and duty of the

Court to decree the termination of a trust, where all its objects and purposes have been accomplished, *where the interests under it have all vested, and where all parties beneficially interested desire its termination.* Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, *and it is reasonable and just* that they should have the control and disposal of it unless some good cause appears to the contrary."

The decision in Nichols vs. Eaton appears to be in exact conformity with the English cases, but not the English cases which go to support the doctrine contended for in the case at bar, for the reason that those cases are not any more applicable to a case of the Nichols vs. Eaton sort than the English cases cited in support of the Nichols vs. Eaton case are applicable to the case at bar. The suggestion of the court "that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though they may soon deprive him of all the benefits sought to be conferred by the testator's bounty or generosity," has no application to the case at bar, because it must be admitted that if any of the legatees under the will of Anna Smith Mallett were to contract debts that their vested interests in the legacies could be reached in payment of the same.

We respectfully submit that the decree of the Supreme Court of the District of Columbia was correct and should be affirmed.

HENRY F. WOODARD,
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Attorneys for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 180.

JEAN L. SHELTON, ET AL., *Appellants*,
vs.
FRANK B. KING, ET AL., *Executors, Appellees.*

BRIEF FOR APPELLEES.

STATEMENT.

Anna Smith Mallett, of the District of Columbia, died November 16, 1907, leaving a will dated June 26, 1903, and a codicil dated June 23, 1904. These instruments, read together, provide that the appellees, as trustees, shall hold $25,000 for each of the appellants until Robert Philo Shelton, who, according to the bill, was born January 12, 1896, shall attain the age of twenty-five years; and, subject

to sundry other legacies, constitute the appellants residuary devisees and legatees of the estate of the testatrix. The bill was filed by the beneficiaries, two of whom are still minors, seeking the immediate transfer of these legacies to the adult complainant and to the guardian of the two minors, under the claim that the provision of the codicil withholding them from the legatees until the youngest arrives at the age of twenty-five years is void, as a restraint upon alienation. The appellees demurred to the appeal, which demurrer the Court of first instance overruled; and, the appellees electing to stand upon it, the Court passed the decree found at pp. 11-12 of the record, requiring the appellee, Frank B. King, who was the executor under the will, to pay over to the adult appellant, Jean Louisa Shelton, one-third part of the entire distributable assets of the estate, and to deliver to the appellees as trustees the remaining two-thirds of the distributable assets, to be by them held in trust until the infant appellants shall respectively arrive at the age of twenty-one years, distributing to each his or her share of the assets upon arrival at that age.

From this decree the appellees appealed to the Court of Appeals of the District of Columbia, which reversed the decree of the Supreme Court of the District of Columbia and sustained the demurrer to the bill.

The question of law involved, whether the devise or bequest of a vested interest, the payment or enjoyment of which is postponed to a future period, is void as a restraint upon alienation, had been decided in the negative by the Court of Appeals ten years or more before the making of the will in this case (Earnshaw vs. Daly, 1 App. D. C., 218), and had been regarded as settled law in the District of Columbia until the filing of the bill in this cause, upon the authority of the case and of the decisions in this Court presently to be referred to.

Points and Authorities.

Under the codicil it will be seen that, contrary to the claim of the opposing brief, at p. 5, that the fund is not given to be held by the trustees; it provides, in terms, that they are "to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton—said trusteeship to terminate when these legatees shall receive their portions of my estate." As such trustees, it became their duty to invest the several legacies, of $25,000 each, and to keep them productively invested until the beneficiaries were, severally, entitled to receive them (Mades vs. Miller, 2 D. C. App., 455, and citations; see, also, the Opinion of the Supreme Court of the District of Columbia, Record, p. 9; Decree, p. 12). The trust, therefore, is not as contended at pp. 5, 19 of the brief for appellants a "dry or naked one, with nothing for the trustees to do," but is an active trust.

Gray's work, "Restraints on Alienation," and the citations collected by him in support of that contention, were the authorities principally relied upon for the proposition that the provision of the codicil, withholding the legacies from the appellants until the youngest of them should arrive at the age of twenty-five years, was void, as being a restraint upon alienation.

The doctrine had its origin in the unwillingness of the English courts to permit property to be settled upon a beneficiary in such a manner that he might hold or enjoy it while his debts were unpaid. To prevent this result, they held that such provisions were contrary to public policy as being in restraint of alienation, and, therefore, void in the absence of a limitation over to a third party in the event of insolvency of the beneficiary; and thereupon, having declared them void in the interest of creditors, they

proceeded to treat them as void for all purposes, with the consequence that the beneficiary, in the absence of such a limitation over, might demand immediate possession of funds or property given to trustees for his benefit, although to be delivered to and enjoyed by him at a future time.

That such has been the rule of the English courts, subject to exceptions to and departures from it which leave the law there in a conflicting and quite unsettled state, and that the rule has been followed by some of the courts in this country, may be conceded without discussion or effort at distinction for the purposes of this case, the question here being, what is the rule upon the subject in the Federal Courts?

This question has been answered by the preface to the original edition of Mr. Gray's little book, which stated in effect that it was written for the purpose of showing that the rule established by this Court in Nichols vs. Eaton, 91 U. S., 716, was contrary to what, the author states, "both in teaching and practice, I had hitherto supposed to be settled law." Unfortunately, after "the book was substantially written," the preface further informs us, the Supreme Judicial Court of Massachusetts, the author's own State, rendered its decision in Broadway vs. Adams, 133 Mass., 170, upholding in its fullest extent the doctrine of Nichols vs. Eaton; and, as this Court has not receded from or modified the doctrine of that case, but, on the contrary, has reaffirmed it and carried it further, the present case might well be rested upon it, without discussion of other authorities.

The learned Court of first instance appears, from its opinion, to have decided the case upon the following extract from 30 Cyc., 1497:

"If A, owner of property, gives the property to B to accumulate the income for a stated period, and then to transfer the principal and accumulated income to C, C may, in most jurisdictions, stop the accumulation, and have the property transferred to him at once. The direction to accumulate is an illegal restraint upon C's power of alienation. The law does not allow A to give C the fee, legal or equitable, of property, and then forbid him to alienate it; no more does it allow A to give C the equitable fee in property, and then compel him to allow the property to accumulate. So soon as the rights in property held for accumulation become vested, the direction to accumulate becomes destructible."

The authorities cited by this work in support of the extract quoted, six in number, are Kimball vs. Crocker, 53 Me., 263; Roger's Estate, 179 Pa. St., 602; MacVean vs. MacVean, 24 Vict. L. Rep., 835; Kaufman vs. Burgert, 195 Pa. St., 274; Smeltzer vs. Goslee, 172 Pa. St., 298, and Van Dusen's Estate, 17 Pa. Co. Ct., 533, none of which, with the exception of MacVean vs. MacVean, 24 Vict. L. Rep., 835, an Australian case following the English authorities, supports it.

In Kimball vs. Crocker, the first of them, the bequest was one of $40,000, to be kept and invested for *twenty-five* years after the testator's death for the use and benefit of his two grandchildren, the interest to be accumulated and paid with the principal at the end of that period, with further power in the trustees to withhold the distribution even then, "if, in their opinion, it would be liable to be wasted or squandered by the improvidence of the person entitled to it, except the interest that may arise therefrom from time to time as needed." The Court held the provision to accumulate void for the reason that it was for a longer period than *twenty-one years*, no lives in being

forming any part of the time of suspension, the decision turning, not on the ground of invalidity as being in restraint of alienation, but as offending against the rule against perpetuities. The Court cites Patterson vs. Ellis, 11 Wend., 259; Blanchard vs. Blanchard, 1 Allen, 223, and Brown vs. Brown, 44 N. H., 281, for the proposition that a legacy may be vested though the time of its enjoyment is postponed.

In Estate of Rogers, the direction was to accumulate the rents and interest until it should amount to enough to erect a four-story brick house on a designated lot. It appearing that a sufficient fund would be accumulated within five years after the testator's death, the provision was held to be good, but that the beneficiaries under the will might elect to take the money without having it applied to the specific purpose, by analogy to those cases in which a sum of money is bequeathed to purchase a ring, or a house, etc., "on the principle that the Court will not compel that to be done which the legatee may undo the next moment, as by selling the thing to be purchased." In Kaufman vs. Burgert, the testator devised a farm to his son in fee simple, with an attempted restriction that the son might dispose of it by will but not by deed, which restriction was held invalid as being inconsistent with the nature of the estate given. In Smeltzer vs. Goslee, the will, after devising a fee to five persons, directed the executor to sell the coal from a part of the land when the youngest of them should arrive at the age of twenty-one years, the proceeds to be under the executor's control and to go to the use of the five beneficiaries "when necessity requires, share and share alike." The Court, without discussion, sustained the levy of execution under judgment against one of the five beneficiaries. Van Dusen's Estate, 17 Pa. Co. Ct., 533, is equally remote.

Of the authorities cited by Mr. Gray in support of the rule contended for by him, a considerable number will upon examination be found, also, to be wholly inapplicable.

Bennett vs. Chapin, 77 Mich., 526, for example, depends for its apparent support of the rule upon an erroneous or misleading syllabus. The decision in that case was based, in effect, upon the ground that the executors had refused to assume the trust, that they were both deceased, that the power was one personal to them, that the administrators with the will annexed were not under the Michigan statute capable of exercising it, and that under these conditions, and in view of the further fact that the annuity allowed the beneficiary was more than $4,000 in arrears, and that she was in absolute need, and there was no one to complain if she were allowed to take possession and to sell and dispose of the entire estate; the Court stating, in terms, that, had the executors accepted the trust and assumed the control of the estate, they "might have insisted on holding the estate in possession until the period when the complainant, by the terms of the will, was to take possession." In the case at bar, the trustees are contending for the right to exercise their duty, under the trusts confided to them by the testatrix.

The foregoing comment upon Bennett vs. Chapin is declared in the opposing brief (p. 15) to be an attempt to lessen the dignity and weight of the case by allusion to the fact that the trustees had not entered upon the trust, and were dead, but that the Court, "quite apart from any attending circumstances, holds *'that the restraint upon alienation contained in the will is void, such restraints not being favored* in law,'" and that the Court approved the doctrine and adopted Section 120 of Mr. Gray's work. This contention, however, overlooks the fact that the quotation made is contained in a part of the opinion concurred in by but

two of the judges; that a third judge based his concurrence in the result upon a Michigan statute, and that the remaining two judges concurred only because of the fact that the complainant was the only party interested and there was no one to complain—the facts showing the case to have been one of much hardship.

And so of the authorities cited in Bennett vs. Chapin: In Mandlebaum vs. McDonald, 29 Mich., 78, the devise was made, not to trustees for the benefit of devisees, but directly to the devisees themselves, the Court declaring, in terms, that the question whether a restraint upon the sale of the property for the prescribed length of time might not have been rendered legally effective by a conveyance to trustees in trust for the benefit of the devisees was not involved;—"in such case, the validity of the restraint as to time depends mainly upon the question whether the period exceeded that allowed by the rule against perpetuities." In Hall vs. Tufts, 18 Pick., 455, another of the citations, the devise was in like manner directly to the beneficiaries, subject to a precedent life estate—"always understanding and meaning that none of my children shall dispose of their part of the real estate in reversion until it is legally assigned to them." In Bank vs. Davis, 21 Pick., 42, the devise was direct to the devisee, "not to be subject or liable to conveyance or attachment." In Brandon vs. Robinson, 18 Ves., 429, the ruling was that property might be limited to a man until he should become a bankrupt, but that, while his property, it must be subject to his debts. In Dobler's Appeal, 64 Pa. St., 9, the devise was direct to the devisee, with the provision that he was "in no wise to sell or alienate any of the property"; while in Craig vs. Wells, 11 N. Y., 315, the remaining citation, deeds directly from a father to his two sons, subject to certain expressed restrictions, accompanied by a bond by

the sons for their observance, were held to impose valid and binding obligations.

In Sears vs. Choate, 146 Mass., 395, cited as a case parallel to the case at bar, the testator devised all of his estate to trustees in trust to give his son $30,000, and $4,000 per annum when he arrived at the age of 21 years, $6,000 per annum when he arrived at the age of twenty-five years, and $10,000 per annum when he became thirty years old, with no provision as to the length of time that the $10,000 payments should be continued. The bill was filed thirty years after the testator's death, and, therefore, after the son had attained his thirtieth year. The Court, conceding the probability that the testator had the idea or intention in his mind to secure to his son support during his life, not exposed to the risks of his improvidence or misfortunes, declared that, if he had such an idea or intention, he had failed to frame his will in such a way as to carry out his intention. "This Court has held that the founder of a trust may give an equitable life tenant a qualified estate and income, which he cannot alienate, and which his creditors cannot reach. Broadway National Bank vs. Adams, 133 Mass., 170. But, in order to give such an estate, instead of an absolute one, the language of the founder must be clear and unequivocal to that effect. Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate, both of the income and of the corpus of the trust."

This was followed by Claflin vs. Claflin, 149 Mass., 19, a case in point with that now before the Court. In it the testator, after other liberal provisions for a son, gave one-third of his residuary personal estate to trustees in trust "to sell and dispose of the same and to pay the proceeds thereof to my son in the manner following, viz., $10,000

when he is of the age of twenty-one years, $10,000 when he is of the age of twenty-five years, and the balance when he is of the age of thirty years." The son received $10,000 when he was twenty-one years of age, and thereupon filed his bill in equity to obtain the residue of the fund; *Held*, that the restrictions imposed by the will were valid, and that its terms should be carried out. The Court, at pp. 21-22, cited Gray's Restraints on Alienation, and the authorities collected in support of the contention in question, and said: "These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the devisee on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will"; and, after a review of the Massachusetts authorities, the Court concludes: "The strict execution of the trusts has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. (Citations.)"

In the present case, the testatrix was a remote relative of the appellees. It does not appear that they are in any manner dependent upon her estate, nor, if they are, that their interests in the residuary clause of her will are not ample for that purpose, or that she was bound to provide for their support as the condition of being legally at liberty to annex to her bounty the condition contained in the codicil.

In Broadway National Bank vs. Adams, 133 Mass., at p. 174, the Court say:

"The rule of public policy which subjects a debtor's property to the payment of his debts does not subject the property of a donor to the debts of his beneficiary, and does not give to the creditor a right to complain that, in the exercise of his absolute right of disposition, he does not see fit to give the property to his creditor, but has left it out of his reach." Still less can the mere beneficiary of a gift complain that the donor has fixed a time, far within the rule against perpetuities, at which the donee shall enter upon the enjoyment of the benefit conferred.

Other Opposing Authorities.

The only Federal authority cited in support of the contention for appellants is Sanford vs. Lackland, 2 Dill., 6. This case was decided in 1871, four years before the case of Nichols, Assignee, vs. Eaton, 91 U. S., 716.

Of the English cases cited, in Wharton vs. Masterson, Appeal Cases, 1895, the Court, following the English rule upon the authority of the prior precedents, says of them: "It was apparently regarded as a necessary consequence of the conclusion that a gift had vested. * * * It is needless to inquire whether the Courts might have given effect to the intention of the testator." Rocke vs. Rocke, 9 Beav., 66, and *In re* Jacob's Will, 29 Beav., 402, simply follow Saunders vs. Vautier, Craig & Ph., 240, which in turn simply follows uncited precedents, all without discussion, while in Jackson vs. Marjoribanks, 12 Simm., 93, the Chancellor follows Boraston's Case, because it had been followed in Bunfield vs. Crowder, although declaring himself to have been astonished on first reading it; while Croxton vs. May, L. R., 9 Ch. Div., 338, deals with a singularly inapplicable proposition.

Of the American decisions cited in opposition, Huber vs. Donoghue, 49 N. J. Eq., 125, and Rector vs. Dalby,

98 Mo. App., 189, are perhaps the only ones which, in the light of their facts, can be said really to follow the English rule. Smith vs. Towers, 69 Md., 77, is attempted to be distinguished, in the brief for appellants, on the ground that, in it, there was a limitation over, but the limitation followed an absolute, indefeasible estate for life, both alienable and subject to attachment for debts under the English rule, which rule is, in terms, rejected by the Court, and Nichols vs. Eaton, Bank vs. Adams, 133 Mass., 170; Rife vs. Geyer, 59 Pa., 393; Executors vs. White, 30 Vt., 338; Leavitt vs. Bierne, 21 Conn., 1, and Pope's Ex'rs vs. Elliott, 8 B. Mon., 56, are declared to be authorities in which is laid down the correct principle upon which the question is to be decided, regardless of the contrary rulings elsewhere, both in this country and in England. The English rule, the Court declares, "which may be evaded by carefully drawn terms and provisions, is hardly worth preserving."

A quotation from Rhoads vs. Rhoads, 43 Ill., 239, is cited at p. 17 of the brief for appellants as the basis of an attempted distinction on the ground that, in that case, the question arose with respect, not to legacies, but to a residuary estate. The opinion quoted continues, with a single sentence intervening, as follows: "He (the testator) was disposing of his whole estate, and devised it to his executors in trust for all his children, one-half of whom at the time of the testator's death were of full age, the proceeds to be invested in United States interest-bearing bonds, and, when fifteen years shall have elapsed after the death of the testator, the whole fund shall be equally divided among his children." A distinction, on the ground of public policy, between the disposition made of a legacy in one case, and of the entire estate in another, is difficult of apprehension.

In Jouroloman vs. Massingill, 86 Tenn., 84, 105, the opinion in which case is by Mr. Justice Lurton, the Court said:

> "Public policy might, with much reason, determine that the owner of property could not impose on his own property, in his own hands, and for his own benefit, any restraint upon his own power of transfer, or the quality of non-liability to his own creditors. But where no act of the owner of the property imposes the burden or restricts the liability, but it was imposed by a vendor, testator or donor, what rule of public policy is necessarily encountered in sustaining such restrictions, even when the legal estate is vested in the owner, all questions of notice out of the way?"

The weight of American authority in the States, it is believed, is decisively in accord with the doctrine of this Court in Nichols, Assignee, vs. Eaton, presently to be considered. Leigh vs. Harrison, 69 Miss., 923, 934; Rhoades vs. Rhoades, 43 Ill., 239, 251; Bennett vs. Bennett, 217 Ill., 434; Pearson vs. Harrison, 230 Ill., 610; Stewart vs. Brady, 3 Bush., 623; Stewart vs. Barrow, 7 Bush., 368; Wallace vs. Smith, 113 Ky., 263; McWilliams vs. Nisley, L. R., 20, Eq., 186; Spindle vs. Shrieve, 9 Biss., 199; Seymour vs. Macavoy, 121 Cal., 438, 443; Weller vs. Proffsinger, 57 Neb., 455; Guernsey vs. Lazsear, 51 W. Va., 328; Mason vs. Trust Co., 78 Conn., 81; Roberts vs. Stevens, 84 Me., 325; Williams vs. Williams, 73 Cal., 99; Jouroloman vs. Massingill, 86 Tenn., p. 115.

Coming, now, to the Federal decisions, to which, as stated, the present discussion might appropriately be limited, this Court in Nichols vs. Eaton, 91 U. S., 716, 725—the provoking cause of Mr. Gray's work—declares: "We

do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of Courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this Court. * * * In this country, all wills or other instruments creating such trust estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life-estate, or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that, in creating a debt with such person, he has no

right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise. Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

As will be seen from the foregoing extract, and more fully from the entire context, the Supreme Court is discussing the rule with respect to its application to the rights of creditors, out of regard for whom alone, as above stated, the English Courts first established the rule, and then afterwards applied its operation indiscriminately to them and to the legatees or other beneficiaries, themselves. If, as the Court held, the creditors of the beneficiary are without right to complain that the donor, who owed them nothing, has imposed restrictions upon his gift, *a fortiori* the beneficiaries of a testator's mere bounty are without right to complain of the conditions which he or she has annexed to it. Nor, is it believed, can any considerations founded in reason, justice or public policy be assigned which should preclude a donor, in conferring a benefaction, from protecting the intended object of it from the danger of his own improvidence, inexperience or the like, for a few years beyond his majority, when presumably he will be better able to protect himself in the enjoyment of it.

Nichols vs. Eaton is followed by Hyde vs. Woods, 94

U. S., 523, 526, in which the Court reaffirms the former case, and confines the rule of invalidity to cases where the restriction is one imposed by the beneficiary, himself, upon property which was his own. "It is quite different where a man takes property by purchase or otherwise, which is subject to that direction or disposition when he receives it. It is no act of his which imposes the burden. It was imposed by those who had a right to do it, and to make it an accompaniment of any title which they gave to it." And the Court sums up the doctrine of Nichols vs. Eaton as, a decision that "the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

So, in Cowell vs. Springs Co., 100 U. S., 55, 57, the Court, considering the same question, though in a different application, said: "The owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, *or for a limited period* or in subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character. Shepherd's Touchstone. 129, 121."

Nichols, Assignee, vs. Eaton, is, in this case, sought to be distinguished on the ground that, in it, there was a limitation over, a feature wholly disregarded by the Court in stating, in Hyde vs. Woods, the doctrine of that case. Had the Court been content to rest its decision upon the ground of a limitation over, there would have been no occasion for it to dissent so emphatically, or at all, from the doctrine of the English authorities, which authorities up-

hold the validity of the restriction where such a limitation exists. The objection loses sight of the fact that, under the will in Nichols vs. Eaton, it was contended that the limitation over was practically one in favor of the life tenant himself, and that, though declaring at p. 724 that this construction did not commend itself to the judgment of the Court, the opinion, at pp. 725-29, proceeds to deal with the case as though that contention were well founded, and thereupon holds that the power of alienation is not a necessary incident to a life estate in real property, that both the rents and profits of real property and the interest and dividends of personal property may be enjoyed by an individual without liability to attachment for debts, and that a testator, who *gives*, without pecuniary return, may use his own property in securing the object of his affections from the ills of life, the vicissitudes of fortune, and even from his own improvidence and incapacity for self-protection. And, at p. 729, the Court concludes: "The judgment of the Court may rest equally well on either of the propositions we have discussed. We think the decree of the Court below may be satisfactorily affirmed on both of them"—that is, both on the ground that there was a limitation over, not to the life tenant as contended, and that, if the case were otherwise, the testator nevertheless had the right to protect him from his own improvidence, incapacity, etc., without a limitation over. (See Jouroloman vs. Massingill, 86 Tenn., pp. 112-13.) The case, we submit, is entirely conclusive of the case at bar, and really leaves nothing further necessary to be said.

It is respectfully submitted that the decree of the Court of Appeals should be affirmed.

ELLEN S. MUSSEY,
J. J. DARLINGTON,
Solictors for Appellees.

SHELTON *v.* KING.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 180. Argued March 11, 12, 1913.—Decided May 26, 1913.

Trustees having the power to exercise discretion will not be interfered with by a court of equity, at the instance of the beneficiaries, so long as they are acting *bona fide*.

In the absence of circumstances and conditions not provided for in the will, there being no question of perpetuities or restriction of alienation and creditors not being concerned, the court should not compel testamentary trustees to anticipate the time of payment of legacies which the testator expressly provided should be held in trust for the legatees until a specified time.

While one may not by his own act preserve to himself the enjoyment of his own property in such manner that it shall not be subject to claims of creditors or to his own power of alienation, a testator may bestow his own property in that manner upon one to whom he wishes to secure beneficial enjoyment without being subject to the claims of assignees or creditors. *Claflin* v. *Claflin*, 149 Massachusetts, 19, approved.

The courts of this country have rejected the English doctrine that

liability to creditors and freedom of alienation are necessary incidents to enjoying the rents and profits from the property by the object of bounty of a testator.

One of the highest duties resting upon a court is to carry out the intentions of a testator as expressed in valid provisions not repugnant to well settled principles of public policy.

In this case the court refuses to compel testamentary trustees to pay over legacies prior to the time specified in the will although the property bequeathed had vested in the legatees.

36 App. D. C. 1, affirmed.

THE facts, which involve the validity of a testamentary trust and the right of the beneficiaries to have the same terminated prior to the time fixed by the will, are stated in the opinion.

Mr. Henry F. Woodard, with whom *Mr. Arthur A. Birney* was on the brief, for appellants:

Appellants took a vested and fixed interest in their legacies, and the attempt to postpone the time for the enjoyment of the same is inconsistent with their ownership, contrary to public policy, and a restraint on the power of their free disposition or alienation, and is, therefore, void. As no other person claims any interest in the legacies appellants may rightfully waive the provision made for their benefit and have the fund paid to them at this time.

It is agreed that the legacies give appellants a vested interest in the moneys bequeathed, so that the only point in controversy is when the fund is to be paid over. *Johnson* v. *Washington L. & T. Co.*, 224 U. S. 224; *McArthur* v. *Scott*, 113 U. S. 340, 380.

Appellants took a vested and indefeasible interest in their legacies and by no known process of human laws could they be defeated in the enjoyment of the same. *Rector* v. *Dalby*, 98 Mo. App. 189.

The will makes no provision with reference to the income or accumulations. It is merely a dry, naked trust.

The fund is not given to the trustees to be by them held, but the gifts are to the children. The only function of the trustee is to lock the fund up and keep the legatees from any participation therein until the youngest reaches the age of 25.

The law is that a trust such as it was attempted to establish in this case is void, or if not void, voidable. For the English rule see *Saunders* v. *Vautier*, 4 Beav. Rep. 115; *Wharton* v. *Masterman*, App. Cas., 1895, H. of L., p. 186; *Josslyn* v. *Josslyn*, 9 Sim. 64; Marsden on Perpetuities, p. 206, citing *Hilton* v. *Hilton*, L. R. 14 Eq. 648; Gray on Perpetuities, § 120.

See, also: *Re Jacob's Will*, 29 Beav. 402; *Rocke* v. *Rocke*, 9 Beav. 66; *Jackson* v. *Marjoribanks*, 12 Sim. 93; *Craxton* v. *May*, L. R. 9 Ch. Div. 338; *Magrath* v. *Morehead*, L. R. 12 Eq. 491.

For the American rule, see 22 Am. & Eng. Ency. 735, 2d ed.; 30 Cyc. 1497; *Rector* v. *Dalby*, 98 Mo. App. 189. *Sears* v. *Choate*, 146 Massachusetts, 395, is parallel to the case at bar and sustains appellants' contention.

See also *Bennett* v. *Chapin*, 77 Michigan, 526, 537, citing *Mandlebaum* v. *McDowell*, 29 Michigan, 87; *Hall* v. *Tufts*, 18 Pick. 459; *Bank* v. *Davis*, 21 Pick. 42; *Brandon* v. *Robinson*, 18 Ves. 429; *Doebler's Appeal*, 64 Pa. St. 9; *Craig* v. *Wells*, 11 N. Y. 315; *Huber* v. *Donoghue*, 49 N. J. Eq. 125; *Sanford* v. *Lackland*, 2 Dillon, 6; *Brandon* v. *Robinson*, 18 Ves. 429; *Kimball* v. *Crocker*, 53 Maine, 263. *The Claflin Case*, 149 Massachusetts, 19, decided in 1889, does not disapprove of the *Sears Case*, 146 Massachusetts, 395; and see *Wharton* v. *Masterman*, App. Cas. 1895, *supra*.

The rule as contended for by the appellees and the authorities cited do not sustain their position.

Mrs. Ellen S. Mussey and *Mr. J. J. Darlington* for appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill to terminate a trust under the will of Anna Smith Mallett. The material clauses are in these words:

"3. I give, bequeath and devise to Jean Louisa, Anna Gertrude, and Robert Philo Shelton, being the children of my cousin John Consider Shelton, deceased, all of Bridgeport, Connecticut: the sum of Seventy-five Thousand dollars, being Twenty-five Thousand to each.

"10. I give, bequeath and devise all the rest, residue and remainder of my estate, real and personal wheresoever and whatsoever, of which I may die possessed to the aforesaid Jean Louisa, Anna Gertrude, and R. Philo Shelton.

Codicil.

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"In addition to Frank B. King, whom I have appointed executor of this, my last will and testament, I wish to appoint Wm. H. Saunders, of the firm of Wm. H. Saunders & Co., 1407 F Street, Northwest, and George W. White, Paying Teller of the National Metropolitan Bank, co-trustees with the said F. B. King,—to hold in trust the legacies devised to Jean Louisa, Anna Gertrude and Robert Philo Shelton,—said trusteeship to terminate when these legatees shall receive their portions of my estate.

"And it is my further will that these legacies to the said Jean Louisa, Anna Gertrude, and Robert Philo Shelton, shall be paid in full when the said Robert Philo Shelton shall reach the age of twenty-five years."

The complainants are the three legatees, Jean L. Shelton, now more than twenty-one years of age, and Anna Gertrude and Robert Philo Shelton, not yet twenty-one, who sue by their guardian. As the youngest of the lega-

tees was not born until 1896, the bill is premature by many years, if the trust created by the codicil is to be regarded.

That the respective legacies are vested and absolute is undeniable. No other person has any interest in them, and if the trustees should disregard the time of payment and pay over to each legatee his or her legacy when they are competent to give a valid discharge, there would be no one who could call them to account. But the trustees, having regard for the express wish of the testatrix, have refused to terminate the trust, and the object of this proceeding is to compel them to pay over the shares of the legatees as they reach the age of twenty-one years.

The objects of the bounty of the testatrix were distant kinspeople. Besides their postponed legacies they were given the residuum of the estate. What that was does not appear. It is not claimed that they are in want, nor that anything has happened since the will which was not anticipated by the testatrix, and no special reasons are claimed for terminating the trust because of new conditions which she did not take into account. In *Sears* v. *Choate*, 146 Massachusetts, 395, a situation arose after the will, which the court thought had not been contemplated by the testator, and for which no provision had been made. The court therefore saw in that a reason for terminating a like trust. In the case at bar no ground, aside from the alleged illegality of the trust, is suggested for defeating the wishes of Miss Mallett other than that it will be convenient and will save the cost of continuing the trust.

The trust is not dry, but is active, and must continue, if not invalid, until the time of payment arrives. Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting *bona fide*. To do so would be to substitute

the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. Lewin on Trusts, 2nd Am. Ed. 448; *Nichols* v. *Eaton*, 91 U. S. 716, 724.

There being in this case no ground for saying that there have arisen circumstances and conditions for which the testatrix made no provision, we may not control the trustee, if the postponement directed by the will does not offend against some principle of positive law or settled rule of public policy.

There is no pretense of perpetuity. Creditors are in no way concerned. If the testatrix saw fit to have this fund accumulate in the hands of trustees and thereby postpone the enjoyment of her gift, why shall her will be disregarded? The restriction she imposed may protect her bounty against ill-advised investments and waste or extravagance. She did not undertake to guard against alienation, except in so far as the alienors will take subject to the same postponement of payment. *Stier* v. *Nashville Trust Co.*, 158 Fed. Rep. 601. Nor did she undertake to protect against creditors as in *Nichols* v. *Eaton*, 91 U. S. 716. The single restriction she imposed upon her gift was that the legacies should not be paid until the time named, and in the meantime should be held in trust.

The appellants contend that whether the trust be active or dry, it is one for the benefit of the legatees, and, as no other person has any interest in the legacies, may be waived by them. For this they cite *Saunders* v. *Vautier*, 4 Beavan's Reports, 115, and *Wharton* v. *Masterman*, Appeal Cases, 1895, pp. 186, 193. In *Saunders* v. *Vautier* it was laid down, without argument, that "where a legacy is directed to accumulate for a certain period, or where

the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." The point thus decided in *Saunders* v. *Vautier* was followed in *Wharton* v. *Masterman*, where Lord Herschell said very significantly, "The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

"It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it."

The doctrine thus stated is the plain outgrowth of certain earlier English decisions in the interest of creditors, which hold, in substance, that the necessary incidents of beneficial ownership in property are liability to creditors and the power of alienation. Having concluded that a testator could not so bestow that which was his own to an object of his bounty as not to be subject to the claims of creditors of the latter, it was a logical conclusion that a testator could not postpone the payment of a vested and absolute legacy beyond the time when the legatee should be able to give a valid discharge. But the acceptance of the principle upon which *Saunders* v. *Vautier* and *Wharton* v. *Masterman* rest involves the acceptance of the limitation which the earlier English cases place upon the powers of a testator in so disposing of his prop-

erty that it may be enjoyed by the recipient without liability to creditors. The foundation of the English doctrine in both classes of cases is an assumption that there is some settled principle of public policy which subjects all property in which one has a beneficial ownership to the claims of creditors and forbids restraint upon alienation. That this theory of public policy is not of universal application, at least in this country, is manifest from the numerous exemption statutes existing which protect to a limited extent the acquisitions of a debtor from the claims of his creditors and restrain his power of alienation in the interest of his family. Neither do we for a moment question the rule that one may not by his own act preserve to himself the enjoyment of property in such manner that it shall not be subject to the claims of creditors or placed beyond his own power of alienation.

But a very different question is presented when we come to the powers of a testator to so bestow that which is absolutely his own as to secure its beneficial enjoyment by an object of his bounty without being subject to the claims of assignees or creditors. This court, and the courts of a number of the States of the Union, have not accepted the limitation which the English courts have placed upon the right of testamentary disposition, and have sustained trusts having as an object the application of a testator's bequest to the support and maintenance of the recipient of his bounty. They have, therefore, rejected the assumption that liability to creditors and freedom of alienation are necessary incidents to the right to enjoy the rents and profits of real estate, or the income from other property.

In the leading case of *Nichols* v. *Eaton*, 91 U. S. 716, 725, Mr. Justice Miller, speaking the unanimous voice of this court, said of the English doctrine to which we have referred, and upon which *Saunders* v. *Vautier* must in principle rest:

"We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulation of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

Touching the theory that public policy forbids restraints upon the disposition of a testator's bounty, the court said (p. 727):

"Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another,

and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

In *Hyde* v. *Woods*, 94 U. S. 523, 526, this court said of *Nichols* v. *Eaton*, *supra:*

"In that case, the mother of the bankrupt, Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy.

"But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

If such a trust as that upheld in *Nichols* v. *Eaton*, was not in violation of principles of public policy, it must follow that one which neither restrains creditors nor alienation is not. If that case is to stand the decree of the court below was right.

The principle upon which *Nichols* v. *Eaton* stands is in line with the views of a number of other courts. Many of them are cited in that opinion, and to those we add: *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170; *Mason* v. *Rhode Island Hospital Trust Co.*, 78 Connecticut, 81; *Jourolmon* v. *Massengill*, 86 Tennessee, 81; *Henson* v. *Wright*, 88 Tennessee, 501; *Brooks* v. *Raynolds*, 59 Fed. Rep. 923; *Smith* v. *Towers*, 69 Maryland, 77;

Keyser v. *Mitchell*, 67 Pa. St. 473; *Seymour* v. *McAvoy*, 121 California, 438; *Steib* v. *Whitehead*, 111 Illinois, 247; *Wallace* v. *Campbell & Maxey*, 53 Texas, 229; *Garland* v. *Garland*, 87 Virginia, 758; *Lampert* v. *Haydel*, 96 Missouri, 439.

Claflin v. *Claflin*, 149 Massachusetts, 19, was a case, on its facts, like the case at bar. The testator gave the residue of his estate to trustees in trust to sell and dispose of as follows: Ten thousand dollars to a son when of age; a like sum when he reached twenty-five years, and the balance when he should reach the age of thirty years. When the son reached the age of twenty-one the trustee paid him ten thousand dollars, and thereupon he filed a bill in equity to obtain the whole of the fund. The Massachusetts court held the trust valid and dismissed the bill. Referring to *Broadway Bank* v. *Adams*, *supra*, where a trust for support and maintenance had been upheld against creditors, the court said:

"The decision in *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this; and the grounds on which this court declined to follow the English rule in that case are applicable to this; and for the reasons there given we are unable to see that the directions of the testator to the trustees to pay the money to the plaintiff when he reached the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the

plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees, as there would be if it were in his own."

Stier v. *Nashville Trust Co.*, decided by the Sixth Circuit Court of Appeals, 158 Fed. Rep. 601, is also directly in point.

The case of *Sears* v. *Choate*, 146 Massachusetts, 395, has been cited as in conflict with *Claflin* v. *Claflin*. It is not. In the former case it appeared that there had occurred circumstances which the testator had not contemplated, on account of which the court saw no reason for not terminating the trust. The case was distinguished in *Claflin* v. *Claflin*.

In the case at bar nothing has happened since the will which was not anticipated by the testatrix. The case falls, therefore, precisely within the later case of *Claflin* v. *Claflin*. There is no reason for declaring the trust invalid. There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid.

Decree affirmed.